COMMISSIONER PAMELA JONES HARBOUR

OPENING REMARKS FOR DAY 2
CLASS ACTION WORKSHOP
SEPTEMBER 14, 2004

Thank you, Maureen. Good morning, everyone. I'd like to welcome you to the second day of the Federal Trade Commission and Georgetown Journal of Legal Ethics' Workshop: "Protecting Consumer Interests in Class Actions."

I want to thank our distinguished panelists for sharing their insights and expertise in this very important area. I hope you will agree with me that yesterday's session was most informative and provocative.

We've learned a great deal about what can be done to help ensure that coupon and other non-pecuniary settlements provide real – instead of not illusory – value to consumers and other class members. It is obvious, however, that we need more meaningful data on the actual redemption rates in "coupon" settlements – so we can better understand whether class members are truly obtaining value in individual cases.

We also listened to a lively discussion on the potential impact of class action settlement objectors and *amicus* filers, each of whom may help to ensure that settlements provide fair and adequate relief for class members.

I am heartened by the real progress that has been achieved in drafting "plain language notices." At the same time, I am, perhaps, more mindful now of the work that remains – before we can feel confident that a substantial portion of the class members actually receive and

understand class action notices, whether sent directly or published. The goal is to achieve meaningful notice to, and active participation by, class members. In the modern-day era of mass communications – where most consumers face overflowing e-mail and snail-mail boxes – we need the advice of communications and advertising experts, who can teach us how to craft and distribute class notices that won't inadvertently be thrown out or deleted as "junk" mail.

I would like to flag one other issue of particular concern to me: the need for workable procedures that enable class counsel to receive reasonable compensation for their work. I believe that plaintiffs, defendants, and class counsel alike would benefit from well-crafted, empirical studies on fee awards.

Finally, as our co-sponsorship with the Georgetown Journal of Legal Ethics reminds us, everything we do in this area must be infused with the highest regard for ethical considerations – especially where the interests of absent class members are at stake. It has long been recognized that courts stand as fiduciary to the class; that class counsel have an obligation to provide adequate representation for all class members; and that the class must be free of conflict. Ordinary ethics rules that protect against conflicts of interest are largely dependent upon a client's consent. These kinds of rules may not work properly in the class action arena, where express, informed consent is often impossible to obtain. Courts typically strive for a balance: protecting the class without unduly burdening the litigation process. But clearly articulated ethics standards – including explicit recognition that class counsel owes at least a quasi-fiduciary duty to absent class members – would help to ensure that the interests of absent class members are adequately protected.

As you can see, we have covered a great deal of ground already – but there is still much more to be addressed. Today, an equally impressive group of panelists will discuss what the empirical data about class actions show, what we still need to know, and how we can best fill the

knowledge gaps going forward. Increased understanding of actual class litigation, settlements, and fee experiences is critical to bolstering the effectiveness of Rule 23 by addressing its strengths and weaknesses.

I am truly looking forward to our last panel: "Class Actions as an Alternative to Regulation: the Unique Challenges Presented by Multiple Enforcers and Follow-on Lawsuits." Given my career background prior to joining the Commission, I am intimately familiar with the unique challenges posed by follow-on or side-by-side private and government enforcement actions. I litigated on behalf of antitrust defendants while I was a partner at Kaye Scholer. And for many years before that, I represented the state of New York and its consumers, as Deputy Attorney General and Chief of the Office's Public Advocacy Division, in a variety of consumer-recovery cases, including the *Reebok*,[1] *Keds*[2] and *Mitsubishi*[3] cases.

In the *Reebok* case, for example, a federal district court approved an $8 million, *50*-state *parens patriae* antitrust settlement for illegal resale price maintenance. The settlement was appealed to the Second Circuit. After the states' settlement was noticed, two Florida lawyers filed private litigation in Florida, and these lawyers later sought to upset the states' settlement on appeal. Their appeal was dismissed on alternate grounds: first, for lack of standing, because they had failed to intervene in the underlying action; and second, because their objections to the settlement and proposed plan for distribution were without merit. In its opinion, the Second Circuit suggested that the appeal by those Florida

[1]New York, et al. v. Reebok Internat'l Ltd., et al., 96 F.3d 44 (1996).

[2]New York, et al. v. Keds Corp., 1994-1 Trade Cas. (CCH) ¶ 70,549 (S.D.N.Y. 1994).

[3]Maryland, et al. v. Mitsubishi Electronics of America, Inc., 1992-1 Trade Cas. (CCH) ¶ 69,743 (D. Md. 1992).

lawyers was motivated, in large part, by their request for fees in connection with their appeal.[4]

In many instances, concurrent or follow-on private class litigation enables the private bar to seek resolution of problems that government consumer protection agencies may not have the resources to pursue. But as my *Reebok* example demonstrates, in other cases, private litigation can disrupt government enforcement. In all cases, careful coordination between government and private litigators should be strongly encouraged, so that the interests of consumers are protected in a cost-effective manner.

I am eager, as I know you are, to hear from our esteemed experts about how they believe we can best manage the interplay between government enforcement actions, *parens patriae* cases, and private class action damage suits. With so very much to cover, let me welcome you all once again, and let's begin.

[4] *Reebok*, 96 F.3d at 49.